



*70-SBE-003

BEFORE THE STATE BOARD OF **EQUALIZATION**
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
JOSEPH H. BABROS)

Appearances:

For Appellant: Richard W. Ackerman
Attorney at Law

For Respondent: John D. Schell
Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Joseph H. Babros against a proposed assessment of additional personal income tax in the amount of \$261.32 for the year 1966.

On May 20, 1966, an interlocutory decree of divorce was granted to appellant's former wife. The decree provided for the division of the couple's community property. Appellant was awarded the ownership of the family business, Pacific Cage and Screen Company, and also a boat, specific real property, various insurance policies, and certain cash. Mrs. Babros received the family home, an automobile, various stocks, bank accounts in her name, an insurance policy, and certain insurance proceeds. Also appellant was ordered to execute promissory notes in favor of his former wife in the total amount of \$175,000. These notes were to be secured by the real property awarded to Mr. Babros. The parties were ordered to pay their own attorney's fees. Such fees totalled \$5,000 for appellant. The attorney allocated \$500 of this amount to his appearance at the divorce proceedings, and the balance to his efforts in regard to the division of property between the spouses.

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On his personal income tax return for 1966 appellant claimed a deduction for the \$4,500 portion of the legal fees. This claim was based upon subdivision (b) of section 17252 of the Revenue and Taxation Code which allows a deduction for all of the ordinary and necessary expenses paid or incurred during the taxable year "For the management, conservation, or maintenance of property held for the production of income.. .." After audit, the Franchise Tax Board determined that the legal fees were not within the scope of section 17252, but rather were nondeductible personal expenses. Whether this determination was correct is the sole issue of this appeal.

The United States Supreme Court has considered this issue with respect to the substantially identical federal counterpart of subdivision (b) of section 17252. In United States v. Gilmore, 372 U.S. 39 [9 L. Ed. 2d 5703, the Court stated at page 49:

...the origin and character of the claim with respect to which an expense was incurred, rather than its potential consequences upon the fortunes of the taxpayer, is the controlling basic test of whether the expense was "business" or "personal" and hence whether it is deductible or not under §23(a)(2).

The Supreme Court held that the claims of the taxpayer's wife with respect to the existence and division of community property stemmed entirely from the marital relationship rather than from income-producing activity, and therefore the legal fees incurred in resisting those claims were personal expenses and not deductible. The above test was also applied in the similar case of United States v. Patrick, 372 U.S. 53 [9 L. Ed. 2d 5803, decided on the same day. This board has followed these Supreme Court decisions in the Appeal of George E. Newton, Cal. St. Bd. of Equal., decided May 12, 1964, and in the Appeal of Rueben Merliss, Cal. St. Bd. of Equal., decided June 28, 1966. We think that the above cases control the instant appeal, and therefore the Franchise Tax Board's determination must be upheld.

ORDER

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

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IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Joseph H. Babros against a proposed assessment of additional personal income tax in the amount of \$261.32 for the year 1966, be and the same is hereby sustained.

Done at Sacramento, California, this 18th day of February, 1970, by the State Board of Equalization.

Richard K. Keon, Member
John W. Lynch, Member
Paul R. Loefer, Member
Herb Kelly, Member
Herb Kelly, Chairman

ATTEST: *J. H. Hansen*, Secretary